DOCUMENT RESUME

ED 268 639 EA 018 357

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TITLE Judicial Rationale for Individual Aid Is Growing: "Witters" Decision.
INSTITUTION Clearinghouse on Educational Choice, Arlington, VA.
PUB DATE Feb 86
NOTE 5p.
PUB TYPE Collected Works - Serials (022) -- Legal/Legislative/Regulatory Materials (090)
JOURNAL CIT Educational Choice; v2 n2 Feb 1986

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Blindness; *Court Litigation; Educational Policy; Elementary Secondary Education; Government School Relationship; Postsecondary Education; Private School Aid; Religious Education; *School Choice; *School Law; *State Church Separation; State Legislation; State Programs; Theological Education; Vocational Education
IDENTIFIERS Mueller v Allen; Supreme Court; *Witters v Washington Dept of Services for Blind

ABSTRACT

This newsletter consists primarily of a legal review of the Supreme Court decision in "Witters v. Washington Department of Services for the Blind" (January 27, 1986), in which unusually clear guidelines are set forth for a constitutionally acceptable program of educational assistance that may include parents whose children attend religious schools. In "Witters," a unanimous Supreme Court relied on the three-part purpose-effect-entanglement test to contend that a Washington State program for vocational aid to the handicapped had a clearly secular purpose, regardless of whether recipients of that aid used it to attend a religious school. This case is reviewed in the context of "Mueller v. Allen" (1983), which upheld a Minnesota law allowing an income tax deduction for tuition, textbooks, and transportation expenses incurred in the education of all elementary and secondary school students--public, private, or private/religious. An emerging standard is outlined based on seven rationales provided by Justice Marshall for approving the Washington program in "Witters." The Supreme Court will not accept any attempts by states to directly support religious schools or teachers, but it will attend primarily to the actual purpose served by any legislative plan that directly or indirectly includes religious schools. It is concluded that these two cases provide strong judicial precedents for an educational policy that emphasizes the needs and rights of individuals (including parents and family), rather than institutions. A brief column, "Notes and News," is also included in the newsletter. (TE)

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February, 1986 Vol. II, No. 2

***Witters* Decision**

Judicial Rationale for Individual Aid Is Growing

by Thomas R. Ascik, J.D.
Executive Director, The Clearinghouse

With its January 27 decision in *Witters v. Washington Department of Services for the Blind*, the Supreme Court seems to have given an unusually-clear explanation of what it regards as the guidelines for a constitutionally-acceptable program of educational assistance that may include parents whose children attend religious schools. Coupled with some other recent decisions, *Witters* has given family-choice advocates confidence that a comprehensive scheme of public/private choice would be upheld as constitutional under the Establishment Clause.

The subject of the *Witters* case was a state of Washington program that provides assistance in vocational education to the handicapped. Larry Witters, a blind student preparing for the ministry at a private Christian college, applied to the program for assistance. Both the state administrative agency and the Washington Supreme Court rejected his application as impermissible government aid to a religious activity.

In upholding the constitutionality of treating Witters like other handicapped students, a unanimous Supreme Court relied on the familiar three-part "purpose-effect-entanglement" test that it first enunciated in *Lemon v. Kurtzman* (1971). The program had "an unmistakably secular purpose . . . the well-being of the visually handicapped," the Court said. And, indeed, that part of the test was not at issue—it was not even argued by any of the parties.

Importance of the Right Purpose

The Washington program of aid to the visually handicapped was enacted quite apart from any legislative purpose to assist religion or religious schools. Thus, unlike the state statutes scrutinized in almost all of the aid to non-public schools cases (e.g. *Lemon, Committee v. Nyquist*, 1973), it was really a complete accident that it became the subject of an Establishment Clause dispute. This innocent "actual purpose" of the Washington program was important to the *Witters* Court and should be considered an important consideration in future legislation.

An equally valid purpose was upheld by the Court in the 1983 case of *Mueller v. Allen*—the case that, along with *Witters*, now seems to control the law in this area. In an opinion written by Justice Rehnquist, a majority of the Court upheld a Minnesota law allowing an income tax deduction for tuition, textbooks, and transportation expenses incurred in the education of students in elementary or secondary schools—public, private, or private/religious. The law passed the purpose test, Rehnquist said, because "A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."

The clearest sort of example, to the mind of the Supreme Court, of an impermissible non-secular purpose sponsored or funded by the government would be the Bible reading struck down in *Abington v. Schemp* (1963).

The Effect of the Assistance

Most of the Court's opinion concerned the second prong of the test, namely, whether giving assistance to Witters would have had a "principal or primary effect" of supporting religion. In concluding that it did not, Justice Marshall went out of his way to explain at length the rationale of the Court. Marshall said that "the Establishment Clause is not violated every time that money previously in the possession of the state is conveyed to a religious institution." A state employee may donate his state paycheck to a religious institution, for instance. That is a "permissible transfer." What is impermissible is a "direct subsidy to a religious school." And even subsidies in the form of aid to parents or students may really be direct

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institutional subsidies in disguise—that is essentially the holding of the *Nyquist* case.

It can be presumed that no legislature will ever again attempt to institute a program of direct aid to religious schools or to teachers at religious schools. The long series of defeats at the hands of the Supreme Court for programs of institutional aid—both *Aguilar v. Felton* (1985) and *Grand Rapids v. Ball* (1985) are very recent examples—would seem to have made that strategy futile. The *Witters* case, then, likely poses the question for all future cases: is a government program of educational aid to an *individual* a *permissible transfer* or an impermissible *direct subsidy* of the *institution* when that aid is used at a religious school?

In answering that *Witters* was a case of a permissible transfer, Justice Marshall cited at least seven reasons: 1) money is paid "directly to the student who transmits it to the educational institution;" 2) the choices of the individual recipients are "genuinely independent and private;" 3) individuals are eligible "without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited;" 4) the program "is in no way skewed towards religion;" 5) the program did not come about as an "ingenious" plan for skirting previous Supreme Court decisions prohibiting state aid to sectarian schools; 6) the program contains no financial incentives for students to undertake sectarian education; and 7) because no greater benefits were provided for attendence at sectarian schools nor were recipients of the aid limited to sectarian schools, "aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater propects to do so."

On the whole, the Court could detect no "state action sponsoring or subsidizing religion" nor "state endorsement of religion." Any aid flowing to the Christian college was a "mere circumstance" that made any link between church and state "a highly attenuated one." (The Court did not consider the "entanglement" part of the three-part test.)

Comparison to the *Mueller* Case

In the *Nyquist* case, the Court ruled that tuition reimbursement grants and tax deductions to parents *whose children attended nonpublic schools* were unconstitutional.

The Court faced tax deductions again in *Mueller* but found that important circumstances required a different ruling. Writing for the Court, Justice Rehnquist found an acceptable purpose, as explained above. Nor was the primary effect of the law the advancement of religion, Rehnquist concluded in the most important part of his opinion. Minnesota's plan was distinguished from the tax deductions in *Nyquist* because "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools."

Having thus distinguished *Nyquist*, Rehnquist was then able to say that there was a significant difference, from the perspective of the Establishment Clause, between providing aid to parents and providing it directly to schools despite the reality that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." Religious schools received public funds "only as a result of numerous, private choices of individual parents of school-age children," and this exercise of parental choice caused the financial benefits flowing to religious schools to be much "attenuated."

In conclusion, Rehnquist argued that the entaglement issue was plausibly raised with regard to the seeming necessity for state officials to determine what textbooks qualified for the deduction. But the Court's approval in previous cases (e.g. *Board of Education v. Allen*, 1968) of textbook loans to children attending religious schools was a sufficient justification, Rehnquist said, of that aspect of the Minnesota plan.

Two Other Recent Cases

If *Witters* and *Mueller* point to an emerging standard in this area of the law, then two 1985 cases, already alluded to, serve as reminders that state aid to religious institutions will not be approved by the U.S. Supreme Court.

In *Grand Rapids v. Ball*, the Court ruled unconstitutional two Michigan programs that sent public-school teachers into Catholic schools to teach special compensatory-education courses. Justice Brennan, writing for the Court, found this arrangement unconstitutional because of three impermissible "effects:" 1) the teachers may "subtly or overtly" teach religion at public expense; 2) the close administrative cooperation of state and church conveyed a message of state support of religion; and 3) the Catholic schools themselves benefited inordinately because the special programs took over a substantial portion of their responsibility for teaching secular subjects.

It can be seen that the latter two reasons of Brennan focus on the issue of state subsidization of religious *institutions*. And, indeed, in denying a contention that the state aid flowed primarily to the students, not to the schools, Brennan replied in a manner that seems much in keeping with both *Witters* and *Mueller*: "Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, the concept of a loan to individuals is a transparent fiction." In other words, the aid flowing to the school was not a "mere" or "attenuated" circumstance—it was a direct subsidy.

Aguilar v. Felton, handed down on the same day as *Grand Rapids*, seems to be both relevant and irrelevant to this inquiry. It may be irrelevant because its analysis focuses completely on entanglement considerations—unlike *Grand Rapids*, *Witters*, and the most decisive part of *Mueller*. It is relevant as still another signal that the Court will not approve programs that directly affect the day to day activities of private religious schools. In *Aguilar*, the court ruled unconstitutional the use by New York City of federal Chapter I funds to pay the salaries of public-school employees who teach in parochial schools.

Caveats and Answers to Caveats

For those interested in policy proposals like vouchers, the way seems clear: any legislation should have as many similarities to the facts of the *Witters* case as possible. Justice Marshall's seven rationales for approving the Washington program are now probably the standard for cases in this area of constitutional law.

It can be argued that *Witters* is a case of a student in college and that it is inapplicable to elementary and second-

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ary schools. Such an argument could be based on the Supreme Court's decision in *Tilton v. Richardson* (1971), for example, in which the Court approved of aid to religious colleges because, *inter alia*, college students were less impressionable and susceptible to religious influence. But the *Witters* ruling did not mention the *Tilton* rationale, nor did it anywhere expressly qualify its acceptance of the Washington program because it was at the college level.

Indeed, a majority of the justices (O'Connor, White, Rehnquist, Burger, and Powell) in three separate concurring opinions, agreed that *Mueller*, a pre-college level case, was directly applicable to *Witters*—a conclusion that Marshall did not go along with in his opinion. So, the old dichotomy between pre-college and college with respect to the Establishment Clause may be now tenuous—at least, it does not seem relevant to the *Witters* case.

The most important limitation of the *Witters* decision is the fact that only one student was involved. To Marshall's mind, this was important. He stated that the amount of state aid going to the Christian college was not "significant" when compared to the whole program. The question becomes how this caveat would affect a comprehensive choice scheme where significant amounts of aid did end up at religious schools. In *Mueller*—a case that dealt with a comprehensive scheme that was neutral with respect to public or private schools—the Court also concluded that any financial benefit accruing to religious schools was "attenuated"—despite the fact that most of the deductions were being claimed by parents who sent their children to private religious schools. One of the reasons for this attenuation of institutional benefit was the fact that the "neutrally available" tax benefit was "ultimately controlled by the private choices of individual parents."

If *Mueller* can answer a limitation of *Witters*, then, perhaps, *Witters* can answer a possible limitation of *Mueller*. In *Mueller*, some emphasis (although not a decisive emphasis) was given to the "mediation" of the benefit to religious schools by the tax code. The Court mentioned that it would normally defer to a legislative decision about equalizing the tax burden of citizens. Marshall may have been trying to distinguish *Mueller* from *Witters* because *Witters* is a case in which tax legislation played no role. However, he may have confounded himself in this attempt. One can just as easily argue that the numerous similarities between *Witters* and *Mueller* have the effect of cancelling out this dissimilarity.

The Future

For advocates of comprehensive plans of family choice in education, what is needed is a carefully constructed legislative proposal based on *Witters* and *Mueller* that, in the words of Justice Powell in his concurring opinion in *Witters*, is "wholly neutral in offering educational assistance to a class defined without reference to religion."

It is abundantly clear that the Supreme Court will not accept any attempts to directly support religious schools or the teachers in them. Nor will it accept "ingenious" schemes to accomplish the same end. Both *Mueller* and *Witters* demonstrate that the Court is most attentive to the "actual purposes" of any plan that directly or indirectly includes religious schools.

The way to avoid such problems is not to have the purpose of channeling public money to private schools in the first place. There are several reasons to think that the way we regard the public interest in education is in need of change. It may be time for the rights and the needs of the individual to take priority over the desires and interests of institutions—public or private. For instance, there is emerging in the field of education policy a new appreciation and understanding of the role of parents and families in education.

This seems to include at least three aspects: first, a growing understanding of the critical and probably definitive influence of parents on the academic achievement of their children. Research psychologist Herbert J. Walberg of the University of Illinois began a 1984 article with this statement: "Syntheses of 2,575 empirical studies of academic learning show that parents directly or indirectly influence the eight determinants of cognitive, affective, and behavioral learning."

Second, there is the political question of the rights of parents to determine the content of their children's upbringing and the corresponding question when and why the state should interfere with this right. In his *Grand Rapids* opinion, Justice Brennan mentioned "the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State." Such a view of individual rights—when exercised by parents

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Individuals v. Institutions

"As far as the record shows vocational assistance ... is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."

—Justice Marshall for the Supreme Court in *Witters v. Wash. Dept. of Services for the Blind* (1986).

"Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, the concept of a loan to individuals is a transparent fiction."

—Justice Brennan for the Supreme Court in *Grand Rapids v. Ball* (1985).

"... under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children."

—Justice Rehnquist for the Supreme Court in *Mueller v. Allen* (1983).

Notes and News

New Raywid Article on Family Choice Arrangements in Public Schools

Professor of education and education researcher Mary Anne Raywid of Hofstra University, Long Island, New York, has published a valuable review of the research literature and history of public-school choice in the current issue (Winter, 1985) of the *Review of Educational Research*. Among Raywid's observations is this one about pluralism: "There are grounds for maintaining, of course, that educationally not only are diverse means *compatible* with common ends, but human diversity makes diverse means *essential* to the realization of common ends."

The Winter edition of the *Review* is available for $7.50 (includes postage) from AERA, Subscriptions, 1230 17th Street N.W., Washington, D.C. 20036.

Raywid's opening paragraph describes the reasons for the rise of choice plans in public education. It follows:

"Choice schemes have proliferated in public education over the past dozen years. Major contributing factors include the following:

* the perception that parents have very little to say about the education of their children;
* the fact that over the years, control of schools has moved increasingly in the direction of central district offices, states, the federal government, and "ancillary structures" (Wayland, 1964), such as textbook publishers, testing services, and accreditation agencies;
* the sense of impotence and ensuing alienation experienced by many parents in trying to deal with local schools;
* the growing evidence of systematic failure of the school to deal effectively with some student populations;
* the growing evidence of the disaffection and psychic estrangement from schools from those who work in them —teachers as well as students;
* the explication and spread of the notion there is no one best system of education for all youngsters;
* the growing public resentment of service agencies and the ensuing critique of the service professions; and
* the intensification of particular social problems, including segregation, school violence and vandalism, the decline of the cities, and youth unemployment."

Transcript of Finn Testimony Available

On October 22, 1985, Chester E. Finn, Jr., Assistant Secretary for Educational Research and Improvement at the U.S. Department of Education testified before the Senate Subcommittee on Intergovernmental Relations on the subject of choice in education. A much lengthier version of his oral testimony, "Educational Choice: Theory, Practice, and Research," is now available at the Office of the Assistant Secretary for OERI, 1200 19th Street, N.W., Washington, D.C. 20208. One of his concluding paragraphs follows:

"What we already know is important. We know, for example, that low income people and minority group members would like more choice. We know that those who can afford it routinely exercise choice by selecting a residence in their preferred public school attendance area, or (less frequently) by choosing private schools. We also know a few important things about the effects of expanded choice. For example, we know that it may be beneficial to student achievement—particularly for the poor or minority student. We know that well-designed choice programs may assist in achieving desegregation goals and may improve the vitality of public education. The research uniformly fails to support the critics' contentions that more choice would harm student achievement, desegregation goals, or public education."

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in the name of their children—seems to have become increasingly a subject of contention in the field of education. A public policy of education based on family choice would be a pacific and comprehensive solution to these contentions.

Third, there is a growing consensus that instructionally-effective schools must be organized more like families than like bureaucracies. Harvard professor of government James Q. Wilson has made the brilliant observation that "What is striking about the desirable school ethos is that it so obviously resembles what almost every developmental psychologist describes as the desirable family ethos."

This discussion of the *Mueller* and *Witters* decisions of the U.S. Supreme Court has shown that there are two very strong judicial precedents suggesting that education be thought about in terms of individuals rather than institutions. To match this judicial opening, legislation is needed that breaks out of the traditional way of thinking about "public versus private" schools and proposes, instead, that the public interest in education should be based on families, or, in other words, that the necessity of parental involvement in education should become the actual basis of the public policy of education.

EDUCATIONAL CHOICE is published eleven times a year except August by The Clearinghouse on Educational Choice, a non-profit, tax-exempt educational organization, with offices at 1611 North Kent Street, Suite 805, Arlington, Virginia, 22209, 703-524-1556. A SUBSCRIPTION IS $30/YEAR.

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